

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

STERICYCLE, INC.,)		
)		
Respondent,)		
)		
And)	Case Nos.	04-CA-186804
)		04-CA-196831
)		
TEAMSTERS LOCAL 628,)		
)		
Charging Party)		

**RESPONDENT’S REPLY BRIEF TO GENERAL COUNSEL’S
AND CHARGING PARTY’S ANSWERING BRIEFS**

NOW COMES Stericycle, Inc., Respondent herein, and files its reply brief to the answering briefs filed by the General Counsel and the Charging Party, as follows:

ARGUMENT

A. The Union Lacked Any Reasonable Belief, Based On Objective Facts, For Its Request for Information Regarding The Two Withdrawn Policies.

General Counsel and Charging Party proffer a number of justifications for the Union’s continuing request for information regarding two policies initially proposed, but subsequently withdrawn, by Respondent. Most of these contentions are addressed in Respondent’s brief in support of exceptions, but some reply is warranted. As set forth in *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 967 (2006), a case cited by the General Counsel, where the requested information relates to matters outside the bargaining unit, the union must demonstrate “a reasonable belief supported by objective evidence for requesting the information.” The Union failed to meet this standard.

The General Counsel and the Charging Party both assert that the information was necessary to investigate what they mischaracterize as “repeated” threats of loss of unit work. (GC Brief at 1, 7, 8, 9, 27, 32, 33, 34, 36, 37, 38; CP Brief at 24, 32). Repeatedly stating that a threat was “repeated” does not make it so. The purported objective factors supporting this asserted belief simply do not withstand scrutiny. Primarily, they rely upon Respondent’s statements made in support of its proposals. While it is contended that Respondent did not retract any threats of loss of work, that contention is based on an unreasonable and self-serving characterization of Cal Schmidt’s correspondence with John Dagle.

The only assertions by Schmidt that might arguably be characterized as a “threat” are the following statements in Schmidt’s July 11, 2016 letter to Dagle:

[W]e will simply need to advise our customers that we cannot comply with their requirements vis a vis our workforce in Morgantown and Southampton—and this may have an impact on our ability to continue to service certain customers at those locations. When we are notified of these consequences, you may be assured that we will bargain the effects of any impact to your members. We will also make sure to advise our customers accordingly that Local 628 objected in a wholesale manner to the imposition of any Company sponsored policies on its employees, including those mandated by the federal government, as a condition of being able to conduct their business.

(Jt. Exh. 8).

If these statements be characterized as a “threat,” it was a threat that customers might take work away from the Southampton and Morgantown units. This “threat” was not “repeated” and was clearly retracted in Schmidt’s August 31 letter (Jt. Exh. 16):

We looked at the size of the bargaining unit—the only employees Company-wide that hadn’t received our policies—which is a total of 160 employees or 9/10ths of 1 percent of our total North American workforce. We therefore made a business decision to withdraw our request to distribute them to your members. In weighing the risk of non compliance with our legal and contractual obligations based on such a small population—we decided that the risk is manageable and that the

time and effort in distributing the policies to such a small group to address all of the union's unspecific objections simply was not worth the investment in time to meet our compliance objectives. *We believe we can defend any outcome from a Federal Audit for compliance relative to these two policies* as we feel we have a justifiable explanation for failure to distribute them to your members. Although *we don't anticipate any customer concerns*, we can address them on a case by case basis.

To reiterate, we will not be circulating the above-referenced policies to your members. If Stericycle revisits its position on this particular issue or *if there are any audit results* that you need to be notified about, we will do so at that time.

(Jt. Exh. 16) (Emphasis Supplied).

Schmidt's reference to a "Federal Audit" was not an assertion that such an audit would occur. Rather, it was an assertion that *if an audit occurred and resulted in the Company being found noncompliant*, Respondent would notify the Union of such results and seek to resolve the issue at that time. So, for the Union to reasonably believe, based on objective facts, that Respondent was continuing to threaten that customers would pull work away, thereby causing a loss of jobs, it would be necessary for the Union to reasonably believe (1) a Federal Audit would occur, (2) Respondent would be found noncompliant, (3) the parties would be unable to reach an agreement that satisfied the government, and (4) customers would remove work from the unit, thereby causing a loss of jobs. There is simply nothing in Schmidt's August 31, 2016 letter (Jt. Exh. 16) that would justify such a belief.

Schmidt reinforced the purely hypothetical nature of any potential loss of jobs in his September 1, 2016 response to Dagle's request for "any documents supporting your contention that the absence of such policies could become an issue in a 'Federal Audit.'" Schmidt responded later that day as follows: "When, and if, it appears that the absence of any policies at Morgantown may adversely impact a term or condition of employment for any member of the bargaining unit in these two locations, we will notify the Union at that time and look to bargain

an appropriate solution.” (Jt. Exh. 18). Schmidt clearly did not “contend” that the absence of policies would become an issue in a Federal Audit or that it would “cause a Federal Audit,” nor did he state that Respondent would only bargain “effects.” In fact, there is no causal relationship between the existence or nonexistence of particular ethics and business conduct policies and whether a “Federal Audit” occurs any more than there is any relationship between the absence of safety policies and an OSHA inspection. Government inspections/audits are often intended to determine whether appropriate policies are in place, but, absent an actual complaint, they are not initiated because of the absence of appropriate policies. Indeed, the government cannot know whether such policies exist unless and until an audit/inspection occurs. What Schmidt was saying was that “if” a “Federal Audit” occurred and “if” the absence of such policies at Southampton and Morgantown (less than 1% of Respondent’s work force) became an issue (which in his prior letter he had stated that Respondent believed it could “defend”) and “if” it appeared that there could be some adverse impact on the unit (which he had stated his prior letter that the Company did not “anticipate any customer concerns”), Respondent would seek to negotiate a “solution;” i.e., negotiate policies that would eliminate customer concerns. Schmidt placed no limitation at all on the type of “solution” that might be reached. The sole reference to “effects” was in the July 11, 2016 letter, but there is no basis for believing that this limitation was being placed on the bargaining referenced by Schmidt in his September 1, 2016 email.

The issue that the Union was perpetuating was purely hypothetical and at least as of September 1, 2016, there were no objective facts to support a belief that jobs would be lost. Importantly, the Union’s request for information did not arise in the context of overall contract negotiations, but instead was triggered by Respondent’s proposed policies. The Board cases cited by the General Counsel and the Charging Party in their answering briefs, for the most part,

involved statements made by the employer during contract negotiations and related to proposals or issues that remained on the bargaining table when the information was requested. For example, in *Peterbilt Motors Co.*, 357 NLRB 47, 49 (2011), the employer asserted during contract negotiations that the facility in question had the highest operating costs in the company and that if work were transferred to other facilities during a strike or lockout, the work would likely not be returned. These statements triggered the union's request for cost data at the employer's other facilities. The employer contended that it retracted these statements by advising the union that the employer's concessionary economic proposals were not based on comparative costs. The Board found no actual retraction, but further noted that the employer never withdrew its concessionary proposals and the union was entitled to the information in order to evaluate how to respond to these concessionary proposals. Similarly, in *Regency Service Carts, Inc.*, 345 NLRB 671 (2005), the employer, during contract negotiations, proposed a drug testing policy that was modeled, in part, on the Federal Drug-Free Workplace Act. Although the employer disclaimed any legal obligation under that Act, it did not withdraw the actual proposal. Thus, the Board found that irrespective of the employer's reasons for its proposals, the requested information was relevant because it would inform the union on how best to respond to the proposal.

In contrast, here the parties were not engaged in contract negotiations, Stericycle withdrew its proposals, and there was no proposal on the table at all to which the Union's request for information related. In these circumstances, once the proposals were withdrawn, Respondent's initial assertions in making the proposals became nothing more than naked representations having no relevance to anything in issue. As such, there was no requirement on

Respondent's part to back up these assertions. *Detroit Edison Co.*, 314 NLRB 1273, 1275 (1994).

It is argued, however, that the information remained relevant for purposes of administering the CBA and investigating whether or not to file a grievance. (GC Brief at 32-34). This argument fails because there is no contention that the Union believed that Respondent had already taken some action that violated the CBA and no reasonable belief, based on objective facts, that it was going to take some action that would violate the CBA. That the CBA contained work preservation language that had been the product of difficult negotiations and that the Union had historical experience with U.S. Foods in which work was moved in spite of work preservation language, hardly justifies a belief that Respondent would, at some unknowable point in the future, seek to relocate work in violation of the CBA. If that is all it takes to make a request for non-unit information relevant there are no limits at all on what type of information a union can seek. The Union was not "policing the contract" because there was nothing to police. It was simply perpetuating a non-issue.

The argument is made that the information remained relevant because negotiations were coming up in the fall at Southampton and the Union needed the information so that it could evaluate whether it should make a proposal in order to further protect employee job security. (Union Brief at 24-30). This contention is specious and unworthy of belief inasmuch as it is not contended that either Respondent or the Union ever even raised the subjects of business ethics and conduct codes during the Southampton negotiations. The Union asserts that it could not make a proposal because it never received the requested information. But it surely is not too much to ask that a particular topic be placed on the table for actual negotiation in order to justify requiring the production of non-unit information. Indeed, there is no contention that the Union

ever stated during the negotiations that it intended to make (or might make) a proposal once it received the requested information. These topics were complete non-issues during negotiations.

In summary, Respondent clearly retracted any contention that customers would be concerned, thereby causing work to be removed (“we don’t anticipate any customer concerns”), and clearly stated that *if* a Federal Audit occurred, Respondent believed that it could “defend” the audit, but if unexpectedly, problems were to arise, it would notify the Union and bargain a solution. The Union’s expressed concerns were purely speculative and hypothetical in nature. Respondent lawfully refused to supply the Union with the requested information. Respondent requests that this allegation be dismissed.

B. Respondent Did Not Unilaterally Implement A Policy Requiring Employees to Sign Forms Authorizing Background and Credit Checks.

As the General Counsel acknowledges, Dagle testified that “we would have no problem with the form that just said MVRs because that’s the DOT regulations.” (GC Brief at 44). But the fact is that Dagle objected to, and denigrated, Schonfeld’s proposal of a form that specifically stated: “My signature above provides authorization only for the procurement of Motor Vehicle Reports (MVRs) needed to review my driving record in support of my FMCSA/DOT Driver Qualification File (DQF).” (Jt. Exh. 29-A). Despite the various contentions made by the General Counsel and the Charging Party in their answering briefs, it is clear that the discussions between Schonfeld and Dagle broke down, not because of any unwillingness by Schonfeld to bargain over the form, but because Dagle made further good faith bargaining impossible by turning the issue into something that it was not and in insisting without any foundation that Respondent was requiring drivers to waive FCRA rights.¹

¹ The Union’s contention that the J.J. Keller authorization waived any requirement of prior written consent by the employee before any information was released to the employer and the

CONCLUSION

WHEREFORE Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 13th day of July 2018.

/s/ Charles P. Roberts III

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right to notice if such information is used as a basis for adverse action (Union Brief at 18 n. 7) is specifically contradicted by the disclosure statements provided with the authorization forms. (Jt. Exh. 23B).

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing REPLY BRIEF by electronic mail
on the following parties:

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This the 13th day of July 2018.

s/ Charles P. Roberts III